

# Short Circuit 253

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## SPEAKERS

Ari Bargil, Anthony Sanders, John Wrench

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### A Anthony Sanders 00:24

You know, honesty, I don't feel like what I've done is a crime. And I think it's illogical and irresponsible for you to sentence me to prison. None of the real criminals of the world ever end up behind bars. I mean, when you think about it, what did I really do? Cross an imaginary line with a bunch of plants? You say that I'm an outlaw, you say that I'm a thief. But where's the Christmas dinner for the people on relief? Well, that was Johnny Depp in Blow. Were he quite unsuccessfully tries to talk himself out of prison to a judge. We're going to talk today about a couple other unsuccessful attempts for people to talk their way out of criminal penalties. We're gonna talk about that with two men who are very familiar with criminal penalties themselves, although not in the same way. They are two of my colleagues and dear friends Ari Bargil and John Wrench. Welcome both of you back to Short Circuit.

### A Ari Bargil 01:29

Thanks for having me, Anthony.

### J John Wrench 01:31

Thanks for having me, Anthony. It's great to be on.

### A Anthony Sanders 01:33

They sound very excited with that introduction, which is to, as I said, Short Circuit, your podcast on the federal courts of appeals. I'm Anthony Sanders, the director of the Center for Judicial Engagement at the Institute for Justice. And we're recording this on Wednesday, January 4, 2023. So is our first episode of the new year. Happy New Year to everybody. We have a great year ahead of us on Short Circuit, all kinds of live shows, special episodes, special things we're

going to be talking about. Today, though, we're going to start it off with, as I said, a more criminal flavor. And you know, one thing we've never talked about on the show before is that Mr. Bargil has had an acting career before he came to IJ. And that involves one of the foremost demonstrations of criminality in the American underworld, which was the show Miami Vice. So Ari, tell us about your your past.

A

Ari Bargil 02:39

Sure, Anthony and Happy New Year to you as well. I would start by saying first that I think it's a bit of a stretch to use the word career. I did have one appearance on an episode of Miami Vice back in I think 1989. As a tender five-year-old, my mom, perhaps foolishly, responded to a newspaper ad offering to take free photographs of your child. Little did she know that the photograph session was free, but the pictures themselves would cost money. And nevertheless, she went forward with it. The photographer offered to then show those photos to a talent agent, which my mom also agreed to and, lo and behold, the phone rang asking how quickly I could get to Miami because this talent agent believed that they had the perfect role for me in a then very popular show called Miami Vice. I went down for a few auditions. I rattled off some lines. I had a scene with Dennis Farina, did not get to hang out with Don Johnson, and thus concludes my acting career, and and I think probably for the better, as I am now a constitutional litigator at the Institute for Justice and not a washed up child actor struggling with substance abuse.

A

Anthony Sanders 03:54

Well, true, true. But for those listeners who maybe actually have heard of Miami Vice, and I gather probably anyone listening under the age of about 30 has no idea what we're talking about. what was the name of the episode if they want to look that up on Netflix or wherever?

A

Ari Bargil 04:13

The name of the episode, and this is on Netflix if you really want to take a look, it's World of Trouble. It's season five, which is the final season I believe and it was the, if I'm not mistaken, the penultimate episode of the entire series. I would strongly recommend though for you to get a good sense of the backstory that you go back and watch seasons one through four first and then make your way through season five, where a character makes a return to see his long lost grandson he didn't know existed.

A

Ari Bargil 04:22

So it kind of won't make any sense if you don't have the prequel.

A

Ari Bargil 04:50

You've got to get the backstory.

A

Anthony Sanders 04:52

Okay, well good. We'll put a link up in the show notes to more information.

A

Anthony Sanders 04:57

And for other information about, well, this more goes to Johnny Depp's movie that we started with, to the drug trade, although this is a quite, I think, legal drug trade, although it's not treated that way under federal law, is this case out of the Second Circuit, United States versus Patterson. So, Ari, what's going on here? And what might be the connection to the federal court system of what these gentlemen were doing?

A

Ari Bargil 04:57

Please don't.

A

Ari Bargil 05:35

Sure. You know, I think the lead in with the monologue from Blow was quite fitting, because, as I think the judge retorts in that movie, which is one of my favorites, unfortunately, the imaginary lines you crossed were very much real. And the plants you were carrying were illegal. And that forms the basis of what I suspect was the district court's opinion, and the opinion of the jury for that matter. In this case, the plaintiffs, or I should say the defendants in this case, are James Patterson, not the author whose books your mother-in-law and my mother-in-law and everyone's mother-in-law has read dozens of, and two gentlemen named Ruben Weigand and Hamid Akhavan. And these guys were engaged in essentially a conspiracy to facilitate the sale of medical marijuana using credit and debit cards in states where medical and recreational marijuana is legal, like California. As you mentioned a moment ago, Anthony, and as most folks know, marijuana is still illegal under federal law. And for that reason, most banks don't want any part of these types of transactions. But never underestimate the spirit and mind of the American entrepreneur. Or in Ruben Weigand's case, the spirit and mind of a guy from Luxembourg caught at LAX on his way to Costa Rica. These gentlemen decided that what they were going to do is set up a series of shell companies that purported or appeared at least to be real, selling things like dog food and diving equipment. And anytime you wanted to order marijuana from your iPhone as God intended, your credit card would be run through one of these shell companies. And so the banks that were processing these transactions, and facilitating the movement of money from purchaser to seller, we're none the wiser. And for a while, they thought that all of these transactions were completely on the up and up. And this worked for a period of time. It worked quite well. These folks at a company called Eaze made in excess of \$100 million through these types of transactions. But all good things must come to an end. Particularly good things that involve using the wires to transfer money for the illicit sale of marijuana. Mr. Weigand, Akhavan, and Patterson were all arrested. This is something called transaction laundering. In Mr. Akhavan's case, he was sentenced to 30 months in prison, he was fined \$1,000, of a possible \$1 million. And the government also sought of course that he forfeit quite a bit of money. The amount of money the government sought, not surprisingly, was every single penny that they could calculate was related to this endeavor, about \$170 million

total. And they said, at the very least, we've got to be able to get \$17 million, which is how much money Mr. Akhavan was paid for setting up these companies and helping assist in this fraud, which is what he was convicted of, of course. At the end of the day, the court said, I'm going to institute a forfeiture of \$103,000, which is the amount of stock in the company that you were given as part of your participation in this scheme. Mr. Akhavan and Mr. Weigand challenge their convictions on appeal. The government cross appealed the trial judge's assessed forfeiture. They all seem to accept that the forfeiture is subject to the Excessive Fines Clause, which is not always the case, but happened here. It's an interesting side note. And anyway, on appeal, they challenged a handful of things, including the sufficiency of the evidence, some evidentiary and procedural things. You know, they say that the evidence, you know, didn't support a conviction in this case. The court starts out by saying we're going to view the evidence in the light most favorable to the government, which is sort of odd in a criminal case. But I'm not a practitioner or an expert in that field. So okay, I am on board with the court acknowledging that basic facts ought to be afforded great deference, especially considering the way that courts treat, you know, jury findings and things like credibility and the weight afforded to certain things. But in any case, the defendants and appellants here say our lies were not material. The court sort of brushes that aside and says, of course they were material; these banks would not have been processing these transactions if they had known that the companies were completely fake and that they were in fact participating in the illicit transfer of money in exchange for marijuana. And they also raised some evidentiary and procedural objections. They say, you know, we should have been able to get certain evidence in. Some evidence should have been excluded. The jury instructions were wrong. The court says no, the judge got that right. And they make some argument about the Confrontation Clause, which the court pretty quickly passed down and says, it was COVID, a guy can testify via video when he's the sole caretaker of his 83-year-old mother in law. And all that brings us to an interesting excessive fines discussion. Because what was at the core of the trial court's decision here on the fine was that to award the government the amount that they sought, would have violated the Excessive Fines Clause. And it would have violated the Excessive Fines Clause primarily because the fine that the government sought, whether it be 153 million, or whatever it was, or the 17 million that they were seeking, was several orders of magnitude greater than what the criminal fine imposed could be or was. They go through Bajakajian factors, which loyal listeners of the show might know, but I'll provide...

A

Anthony Sanders 11:22

I think that was very good pronunciation of that case, Bajakajian. Took me years to figure that out.

A

Ari Bargil 11:29

Not my first time uttering it, in fact, and I have uttered it with some success and some lack of success in the federal courts myself. But in any event, the court applied the excessive fines analysis articulated by Bajakajian, at least the Second Circuit's iteration of it, which consists of four factors, the first being the essence of the crime of the defendant and its relation to other criminal activity. Courts will consider, two, whether the defendant fits into the class of persons for whom the statute was principally designed. Third, the maximum sentence and fine that could have been imposed and, four, the nature of the harm caused by the defendant's conduct. And in reversing the trial court's order on the forfeiture, the second circuit says, hey, you kind

of overvalued the third factor, which is the comparison between the fines sought or the fines imposed and what could have been imposed here. You know, the district court said, hey, the statutory scheme calls for a maximum fine of a million dollars for this offense and actually only imposed \$1,000. So awarding the 17 million that the government is seeking here is way beyond that. And then the district court also went ahead and considered other factors, namely the harm and who was actually hurt here. And they also said, yeah, you know, this is major fraud, but nobody actually got hurt. And in fact, a lot of people actually made quite a bit of money here. So what really is the fraud? You know, the victims here, supposedly the bank, also got quite rich off of this endeavor. And goes almost as far as saying, hey, getting marijuana delivered to your door from your iPhone, by way of your credit card is actually pretty awesome. But nevertheless, the circuit court says, hey, you know, you put too much emphasis, the district court did, on the comparison between the potential fine that could have been imposed and the forfeiture that we're seeking. And it doesn't always matter that the fine that the government is seeking severely exceeds what the maximum criminal penalty would be for the same conduct, because sometimes the criminal enterprise can be so lucrative that it makes sense. And so they send the case back down, and they say, take another look at this, reconsider whether this gross discrepancy between the maximum criminal fine and the forfeiture imposed is actually enough to carry the day here and reconsider that in light of our case law that that basically says, where a criminal enterprise is super lucrative, it's okay for there to be a gross disparity between the amount of money sought in forfeiture and the potential maximum fine, which in this case, like I said, was a million dollars, and where the district court only imposed a fine of \$1,000. I think there are a couple interesting takeaways here for people who follow the excessive fine stuff. You know, there's some discussion about the extent to which courts have discretion in imposing these fines. It was nice that the court here didn't batter the district court for just kind of calculating what it thought was an appropriate fine and not just reflexively ruling in favor of the government. They sent it back down and they said, hey, you might still find that this fine is unconstitutionally excessive, but just make sure you make that finding in light of what we're telling you here. And the court also said, and this is something that I don't know that I've really seen too much of before, that when recalculating, or considering what the fines should be, your imposition of the fine can't be any less than what is absolutely necessary to avoid an excessive fines problem. In other words, figure out what the dollar figure is of an unconstitutionally excessive fine would be, figure out that amount, reduce it by \$1. And that's your fine. And so there is there is a little bit of play in the joints, I guess, between not telling the district court that it abused its discretion, but at the same time articulating to the district court, here's how you find what your appropriate figure should be in assessing excessiveness in the course of imposing this forfeiture. And that is the story of Mr. Akhavan, who had a good idea, but maybe should have quit while he was about \$17 million ahead.

A

Anthony Sanders 16:03

John, where do you see the excessiveness?

J

John Wrench 16:07

I mean, it is interesting that the district court, and I imagine that this is what the circuit court was at least thinking in part is, it's interesting that the district court realized that it needed to be careful of imposing a fine that was too high and then dropped quite a bit below what the criminal maximum would have been. And I do wonder if the circuit court saw that and said, you

know, there was quite a bit of space between \$100,000 and a million dollars. You know, you could have done all these things. And I found it interesting that, at least from my understanding, I don't think the district court said that its decision was based entirely on that factor. But there was something in that decision that the circuit court said, even though it wasn't based entirely on it, it looks like it was based mostly on or too much on it. And that does call into question, you know, what do you have discretion to impose with those factors? And it almost invites a district court to come back and say that they reached the same conclusion, but they're going to emphasize the other factors a little bit differently. And they're going to analyze it a little bit more thoroughly, and maybe underemphasize the maximum fine. But I do appreciate that the circuit court opinion doesn't exactly call for the conclusion that it wasn't excessive, it does keep some discretion with the district court.

A

Anthony Sanders 17:45

I thought it was interesting that that could have played more into the opinion, and I guess I see why didn't, is the bank's role in all this. Because they do briefly say that the bank officers were actually involved in the trial. And they said yes, we would not have taken this money if we had known that it was for sales of medical marijuana, which I think they probably have to say to like, keep their license or if their charter is a federal bank, because, you know, if they knowingly took that money, then they themselves would be in trouble. But they obviously were totally cool with making money off this, like any bank is with any business. And although the court credits the testimony of the officers, it doesn't take into account that, of course, they're going to say that because they themselves would be in hot water if they didn't, and therefore, you know, what they were prosecuted for, this the wire fraud or bank fraud, is actually not something that harmed anybody. Now, you could say, well, marijuana itself is illegal and so that is what they're being prosecuted for, but that it wasn't exactly what they were charged with. So it seems like there's a disconnect in all of that, that, I don't know, maybe is underlying some of what the district court did.

A

Ari Bargil 19:20

Yeah, I think all of this underscores just the utter sham that is this country's policy toward marijuana and its sale and consumption. To John's point, you know, I think you're probably right that they're inviting the district court to maybe just get it right on the law, not overemphasize the disparity between the amount that could have been imposed and the amount that government is seeking, and maybe play up the fact that this is utterly victimless. All of this is victimless. These are people who are facilitating transactions between willing buyers and willing sellers who, as far as they know, certainly in the shoes of the buyers, are engaged in lawful commerce. These transactions are not technically illegal in states that allow for medical and recreational cannabis. And the federal government's involvement here is always curious and useless. And like I said before just underscores how difficult it is to navigate this space, with banks happily accepting the money as long as they can say that they didn't know where it was coming from. And I strongly suspect, Anthony, I agree with you, I strongly suspect that the banks probably had an inkling or could have checked and found out relatively easily whether the fake dog food companies out of the Caymans were really doing such gangbusters business because they were selling such amazing dog food and dive supplies and face cream.

A

Anthony Sanders 20:48

Well, from one victimless crime, we're gonna go to another one, which may be a bit of a property rights violation, parking illegally in a driveway. So, John, how did this turn into a federal crime?

J

John Wrench 21:05

Yeah, so, I just want to start with the title of the case, because I think it's great. In the case caption there are about seven or eight different aliases for the defendant, but it's United States versus Jonathan Edward Charles Anderson. And the best of the aliases is X Rage. And so, at around 2am, Jonathan Anderson, or X Rage, you know, you can you can pick whatever one you like. He was driving around in San Bernardino in a truck in California, and a sheriff's deputy initiates a stop of the truck, because the license plate was apparently partially obscured. And that, you know, it's the only time there's a mention of the license plate. But according to the deputy, Anderson then turns down a dead-end street after the deputy has already activated his lights and then pulls into a driveway about 30 to 45 seconds later. And so, the deputy later says that he believed Anderson was attempting to flee. So when the deputy leaves his vehicle, he confronts Anderson at gunpoint. Anderson says that he didn't see the overhead lights, he was at from the area, and had parked in a friend's driveway. And even there, you might get a little bit of tension of I'm not from this area, I don't know where I am, this is my friend's house that I pulled into. But we'll get there. But regardless, the deputy radios dispatch, and around 2:05am, and that time will matter later, the dispatch informs the deputy that Anderson is a career criminal and has an expired license. And so right, we've moved from something that, you know, was a random traffic stop to something that, if you put yourself in the deputy shoes, you might think that they are thinking things like there might be something in this vehicle that's evidence of criminal activity. And, you know, I think that that plays out. There's a lot of disagreement about what comes directly after. Anderson says the deputy immediately searches his truck after he finds out that Anderson has a record. The deputies claim that the search didn't immediately happen. They said that they told Anderson his truck would be towed because he didn't have a valid license. And that the deputies were going to conduct an inventory search. And I'll talk a little bit about what an inventory search is in a little bit. But the deputies also refused Anderson's request that a friend come get his truck, which is interesting, because you know, even though he said he didn't know where he was and he's not from the area, he did request that a friend come pick up his truck. So maybe there, you know, there was an opportunity for someone that he knew nearby to come and get it. But regardless, the deputies say no. The deputies also testified that before they conducted the search, they went up to the house where Anderson had parked. They knocked on the door, the homeowner came out and the person who Anderson claimed was his friend had no clue who Anderson was. He had never met him before. And neither Anderson or the deputies are in disagreement about that, the homeowner did not know who Anderson was.

A

Anthony Sanders 24:27

Even as X Rage? I don't think him.

J

John Wrench 24:30

Even as X Rage. Yeah. I don't know if they went through each of the aliases to double check



Even as a judge. Yeah, I don't know if they went through each of the houses to double check, but he didn't know any of the versions of Mr. Anderson. So that's what officers say. Officers say that they went and they talked to the homeowner before conducting the search. The homeowner and this is important later to for the court's analysis. The homeowner actually says it took him a minute or two to get up to get to the door and that they then spoke with the deputies for three to five minutes. But regardless of when the search occurred, the deputies end up searching Anderson's truck while it was in the driveway, and they found a loaded handgun under the driver's seat. So they arrest Anderson for being a felon in possession of a firearm. One deputy takes Anderson to jail while the other one stays behind with the truck to complete an inventory search, which included filling out inventory search forms. So what these forms are is, police departments, sheriff's departments, they have forms whenever they're conducting something that's called an inventory search. It's a vehicle that's been taken into police custody. And the forms usually require officers to do something like what it requires them to do here. It requires them to identify any personal property contained in the vehicle. And so on that form here, the deputy identified two radios in the car and the firearm. But there was a bunch of other stuff in the truck. There were two pairs of expensive sunglasses, a watch, there was a box of tools, there was a bottle of cologne, there was a speaker, and none of that makes its way on to the inventory form. The government then charges Anderson with a single count of felon in possession of a firearm and ammunition. Anderson moves to suppress the evidence. And he argues that both the impoundment and the inventory search of his truck violated the Fourth Amendment. The district court denies his motion to suppress. He enters a guilty plea, but reserves his right to appeal the suppression order. So his appeal makes it up to the Ninth Circuit. And it's heard by a three-judge panel, including Judges Ikuta, Lee and Forrest, and that will matter because there are three judges and there are also three opinions in this case. The majority opinion is per curiam, which means that it's not signed by any particular justice. It's issued by the court. But Judges Lee and Forrest each write separate opinions dissenting in part for different reasons. So three judges, three opinions. So the Ninth Circuit needs to answer two questions, really. The first one is, was the impoundment of Anderson's truck lawful, and if so, was the subsequent inventory search lawful? So starting with the impoundment, the majority says, under the Fourth Amendment, the general rule is that the government can't search or seize your vehicle without a warrant supported by probable cause. But there are exceptions to the rule. One of those exceptions is when the government has a so-called community caretaking justification. And under this community caretaking exception, officers can impound vehicles without a warrant when the vehicle impedes traffic or threatens public safety. So an example of that might be a vehicle parked in the middle of a street or a vehicle that's been totaled and it's lying in a ditch. The community caretaking exception allows police to take custody of that vehicle and remove it from where it is. That exception also then allows officers to conduct an inventory search of the vehicle that they've taken into their custody. And an inventory search complies with the Fourth Amendment, so long as it's guided by some general standards, usually a police handbook or something like that. And it can't be, this is very important for the all three of the opinions, an inventory search cannot be simply a pretext for a criminal search. So police can't take the vehicle into custody and then do a nominally administrative search to see what's in the car, when really what they're doing is they're looking for evidence of a crime. So the majority says there's some disagreement about when the deputies searched Anderson's truck and at what point and for how long deputy spoke with the homeowner. And that matters because if officers conducted the search and then found the gun, before there was a valid reason to impound the truck, the community caretaking exception doesn't apply. And there's probably a Fourth Amendment violation and because they needed a warrant. But the majority says the deputies testified that they didn't conduct the search until after speaking with the homeowner, until they learned that the homeowner didn't know Anderson and they learned that Anderson was a career criminal with an invalid license, so



he couldn't drive his own vehicle away. And he had, you know, he had just lied to police and parked in an unknown person's driveway. And so the majority says there was a valid community caretaking purpose for taking custody of Anderson's truck. Two judges on the panel agree with that conclusion, but Judge Lee does not. He says listen, there's a lot of conflicting evidence about when the deputies searched Anderson's car and some of that evidence suggests that officers searched the truck before they had a community caretaking purpose. And so Judge Lee would have remanded the case, he would have sent it back down for the district court to figure out exactly what happened. Because if officers did, in fact, immediately search Anderson's car without finding out that he wasn't in a friend's driveway, that would be a problem. But you have two judges saying that there was a valid community caretaking purpose. So the next question is whether there was a valid inventory search. And in essence, Anderson argues that the inventory search was unconstitutional because deputies didn't comply with their own guidelines for conducting the searches. Like I mentioned before, the deputies noted that there was a firearm and two radios in the car, but they didn't mention anything about all of Anderson's other personal property, which was required under the sheriff's department's policies. So the majority rejects that argument. And it says that, yes, the deputies should have inventoried everything. But the failure to complete an accurate inventory is not in itself enough evidence that this was actually a pretextual search for criminal activity. So they're saying yes, it was an error. But the question is not whether an inventory was perfectly completed. It's whether a poorly completed inventory search indicates that that's not really the reason why you did it. And so, although Judge Forrest agrees that there was a community caretaking purpose to take custody, Judge Forrest argues that the Fourth Amendment was violated because police did not comply with the requirements for an inventory search. And Judge Forrest's point is, you know, we allow officers to dispense with a warrant requirement, we allow them to search vehicles and then conduct an inventory search without a warrant, because it's supposed to be limited to a very particular goal. And that means that officers actually have to comply with that goal. And if you're conducting an inventory search, maybe you should take an inventory of the vehicle. And it's alarming that when you look at the inventory report, the only real thing that's on there is the piece of evidence that the government wanted to use to convict someone of a crime. You know, the officers are kind of telling you why they conducted the search because of what they included on the report. The majority says, meh, compliance doesn't need to be perfect. Failing to list everything in the vehicles just isn't evidence that this was really a search for criminal activity. The majority kind of waves that complaint away. It's you know, like I said before, their point is that inventory searches don't need to be perfect, they just can't be a cover for a criminal search. And there wasn't enough evidence to prove that. So Anderson's sentence stands. Two judges agree that the impoundment was constitutional. Two judges agree that the inventory search was constitutional.

A

Anthony Sanders 33:16

Ari, do you think there might have been a wee bit of a pretext here in this inventory search?

A

Ari Bargil 33:22

It certainly seems the case that there was a little bit more motivating the search than just plain old, administrative, reflexive cataloging of what they found in the car. Let me first say I am firmly in the camp of both dissents. It seems to me that the search itself almost strains

believability that it could have been done in the amount of time that the police are saying that it was done in order for it to have occurred after speaking with the homeowner. And then on top of that, I think that we have very strong indications that the inventorying was kind of a pretext to uncovering evidence of a crime. And I think, you know, the standard here is what actually seems most concerning to me, because basically, there's no Fourth Amendment violation unless you can point to some exercise of bad faith on the part of the police or prove that the inventory was solely for the purpose of obtaining evidence of a crime. In other words, as long as the government can point to some legitimate law enforcement function, even if it doesn't comply with the relevant guidelines that attach to that function, that's totally fine. And that almost feels like a little bit rational basis-y to me, where as long as there's just this plausibility of legitimacy, we're going to look the other way, which I find particularly troubling in the Fourth Amendment context. I also have some concerns with the way the court just kind of waves aside that the police officers neglect to follow their own procedures. We see this sometimes in procedural due process cases where governments have a set of guidelines for providing notice and letting people know that they're, you know, facing a potential deprivation of property, et cetera. And then they violate their own rules. And then courts say that's okay. You didn't have to follow them anyway. Because, you know, rules and regulations are not the same as, you know, constitutional strictures, and therefore, the fact that you violated your own rules doesn't mean you violate the Constitution. And I think that's wrong, both in that context and here, we're what we're talking about is reasonableness. The court here seemed to say a bunch of times that what matters for Fourth Amendment purposes is reasonableness. And I would contend that it's reasonable to expect law enforcement to follow their own rules. We are all expected to follow the rules. Law enforcement often is not expected to follow their own rules. And again, this is just an example of I think law enforcement getting away with a defense that none of us can mount, which is, yeah, maybe I broke the rules, but I tried to follow them. So everything's okay, right?

**J** John Wrench 36:07

Yeah, I think that the majority opinion really makes kind of obvious that there might actually just be a law enforcement exception to the Fourth Amendment. There's all these labels that we use, and especially the combination of the exceptions, when you look at them, when you zoom out and you look at them all together, I think that you can make a case that, you know, the ability to take custody of the vehicle combined with the ability to inventory the vehicle, and then even how lenient the standards that apply to those rules are. What it really ends up looking like is that the Fourth Amendment is subject to what police need to do to be able to act on, and I think here is a good example, I think the police had what turned out to be a pretty accurate instinct that there might be something in this car that this career criminal, as they said, might be up to no good. But the problem with allowing that discretion to overcome constitutional protections is that there won't be any constitutional protections after all these holes are poked in it. And I think I agree with Ari that if you could take both partial dissents and cobble them into an opinion, this would actually be a much better opinion. You could either remand it to figure out what was actually going on, whether police were not exactly truthful about when they conducted the search, when they found out that they might have a basis for conducting the search. And that if you're not actually doing an inventory of the vehicle, is it really an inventory search? And just just one more thing that Ari said that I think is interesting is this idea that the distinction between an administrative search and a criminal search is kind of hard to believe here, that this wasn't actually pretext. And I think that that's really a commentary on a lot of the Fourth Amendment exceptions that are related to this idea that when the purpose of the search is criminal, we have the real Fourth Amendment, we have a

warrant requirement supported by probable cause. But there's all these situations where police want to do things that are not really about criminal search. They're more administrative or they're routine. They're for health and safety. They're not about criminal search, and there the Fourth Amendment, you know, is that really what the Fourth Amendment is about? And so there's justifications that weaken it so you don't really need a warrant. And this case is a good example of if an inventory search is really just for an administrative function, that does not prevent the fact that there are going to be even criminal consequences of an administrative or routine search. And the idea that there is a wall between a criminal search and a non-criminal search, or that that distinction is based in the Fourth Amendment, I think is pretty suspect.

A

Anthony Sanders 39:24

That brings up a anecdote from many years ago where we at IJ had a rental inspections case, which is another area where the the Fourth Amendment gets much less play because the search in question where you're inspecting a rental property for health and safety violations is not considered law enforcement. We were discussing the case with attorneys for the city in this case, and said, you know, well, why do you need to do these inspections, essentially. And if the attorney knew what they were doing, they'd say, well, the inspection of course, is to see if there's shoddy wiring or something like that. And the person said, well, there are meth labs in the city. So obviously, this is a pretext for finding something that you couldn't find under normal Fourth Amendment rules. And in this case, with this traffic stop, it's almost one of the best examples you could find of just layers upon layers of exceptions to the Fourth Amendment that shouldn't be there but kind of add up to allowing the police to do whatever they like. Like, for example, even if the sole conversation with the homeowner is as the police said. I mean, essentially, what it is, is the car is parked without permission on private property. Okay, well, what do we do about that? Obviously, the owner doesn't want the car there. So yeah, you could have a friend who has a valid license drive the truck, but the police say they can't do that. Why? It's not really explained. Okay, how about the policeman himself, get in the truck, turn the key and then pull it onto the street. That's a dead-end street. They probably had on-street parking there to just move it off the property. And then you know, have a friend or family member of this man come and get the truck in the next day or two, which is probably completely fine under the law. And yet, they can't do that; they have to tow it right now. And yet, they don't tow it and then do the inventory search at the station, which is actually how I always thought these things go, but I'm thinking now that's not how inventory searches works perhaps or at least it wasn't in this case. They do the search obviously before the tow truck even gets there, because it was, what, two minutes apparently after the stop, which makes me think this is not an inventory search at all. This was the cops coming up, searching the car, finding the gun, and then they retro, okay, how are we going to justify this? And they could have done it maybe under probable cause if they had smelled marijuana, but they didn't even come up with that. And there's a whole bunch of other exceptions they could have tried to use. And so they come up with, you know, later on, well, it was an inventory search. Which makes me, I mean, I was already suspicious of the whole inventory search doctrine. But now, I mean, it must be just taught to law enforcement officers over and over again, you try and tow that car whenever possible, whatever you excuse you have, because then we can of course do the search without getting a warrant or even probable cause, which often you don't even need a warrant for a vehicle search. And then, you know, you can even do the search before the tow truck arrives and not even bother with the regulations we have for the inventory search, which I'm sure these regulations are only done so we can have better pretexts for doing inventory searches. So you have like five layers there of where the Fourth Amendment doesn't apply at all, where this guy...one other thing, like, say I'm borrowing your car and you want to like look

in the car to make sure what items are in there so it doesn't get lost, right? Because I don't want to be responsible for losing your stuff. So I borrow Ari's car. And I look around and say, okay, there's some sunglasses, you know, there's a radio or whatever. Do I look under the seat to see if there's a gun perhaps? Ari's gun he left under the seat? No, no one looks under the seat. And yet the cops in the inventory search looked under the seat, and then they itemize that gun and not all this other stuff. It makes no sense. This wasn't an inventory search. It's nothing to do with that. And yet, it's held up as not a pretext. It's infuriating. And I'm sure this happens every single day in every single city, across the country. Okay, rant over.

J

John Wrench 44:06

Yeah. Yeah, I mean, it's a good brand. And you know, this is one of those situations, and Ari earlier mentioned rational basis, you know, when there's these cases where the government comes forward with a reason that it's doing something and the only things that the policy is actually tied to are illegitimate things, you have to wonder maybe the government is actually trying to do an illegitimate thing and backfill it with a bunch of legitimate reasons that are kind of fanciful. And this is I think the worst thing about this case for me, this decision for me, is it's not just that the officers potentially, I mean, I think based based on the factual disputes, there's a good argument to be made that the police did search the vehicle pretty quickly. And if they did, then the government then tried to backfill this with legal arguments to try and justify this as an inventory search. But then the court takes all of that and smoothes it all out to fit in a bucket, to fit in an exception to the Fourth Amendment, to justify everything that happened in almost like a bureaucratic way. And I think that's what's so frustrating about what the court did here, and like we've all been talking about, at what point did the police take custody of the vehicle? What did they impound? Because usually that's the term that's used, an impoundment proceeds an inventory search. So when did the impoundment happen? Well, the impoundment happens after the search. And so the court says, you know, there's two steps. There's an impoundment, the police take custody, and then there's a search. And it's not really clear when the police took custody, because they probably never did. They just did the search. But the court smooths all that over and says there's two steps, police took custody, did they have a valid reason to take custody? Maybe, maybe not, but probably, and that's good enough. And then, you know, there was an inventory search. It wasn't really an inventory search, it didn't inventory the vehicle. That's also fine. The law justifies this type of activity. And so, you know, you could maybe understand being the deputies here and having a hunch that you want to act on. You can understand being, you know, the government wanting to justify that hunch. But the courts are supposed to stop and say, does this actually fit into our understanding of the Fourth Amendment's protections? And I don't think it does, and I think they validated layers of misbehavior.

A

Ari Bargil 47:04

Yeah. Judge Forrest's dissent, I think, kind of touches on this at the end, if I can add this real quick, that, you know, if we're just doing this sort of mechanistic application of what we think the Fourth Amendment says and how all these exceptions can work together to allow this type of misbehavior, then this basically just becomes a game for lawyers and judges. And I think that's exactly what happened here. The most disappointing thing about this opinion for me, honestly, is the way that the court just totally swallows the factual narrative that was provided to them by the government. In this case, I find it borderline impossible and unbelievable that

the sequence of events took place in the way that the police articulated it. It astounds me that there was only one opinion calling for returning this to the district court to figure out what actually happened. And instead, we're just going to accept officer testimony that, you know, it's self-serving, yes, but it also seems to defy any sense of time or space. And therefore, I think that there just needs to be a little bit more scrutiny. And that obviously fits in with what we're what we're commonly talking about here, Anthony, from a CJE perspective and getting courts to really engage not just with law, but, in this case, with facts.

A

Anthony Sanders 48:21

Yeah, I mean, the paradox from a judicial engagement perspective is two of these three judges thought the case in some way was done wrongly or should be sent back down, yet the conviction stands. Go figure. Well, thank you for sticking around with us, listeners, and maybe you can go figure what happened in these cases and also what happened on Miami Vice. So we'll leave it there. Thank Ari, thank John for coming today. And until next time, I hope that all of you get engaged.